1989

State of Utah v. Randall D. Tucker : Brief of Appellant

Utah Court of Appeals

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890423-CA

IN THE COURT OF APPEALS OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
	:	
D. TUCKER,	:	Case No. 890423-CA Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from a judgment and conviction for Theft, a third felony, in violation of Utah Code Ann. § 76-6-404 (1953 as amended), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Michael R. Murphy, Judge, presiding.

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THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
v.	:	
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STATUTES AND CONSTITUTIONAL PROVISIONS

TEXT OF STATUTES AND CONSTITUTIONAL PROVISIONS

Amendment V of the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI of the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

Amendment XIV of the Constitution of the United States provides in pertinent part:

> **Section 1.**
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, § 7 of the Constitution of Utah provides:

> **Sec. 7. [Due process of law.]**
> No person shall be deprived of life, liberty or property, without due process of law.

Article I, § 12 of the Constitution of Utah provides:

> **Sec. 12. [Rights of accused persons.]**
> In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases . . . .

Rule 403 of the Utah Rules of Evidence provides:

> **Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.**
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404 of the Utah Rules of Evidence provides in pertinent part:

> **Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.**
>
> . . . . .
>
> (b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 609 of the Utah Rules of Evidence provides in pertinent part:

> **Rule 609. Impeachment by evidence of conviction of crime.**
>
> (a) **General rule.** For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. § 77-35-26(2)(a) (Supp. 1989) and Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1989), whereby a defendant in a district court criminal action may take an appeal to the Court of Appeals from a final judgment and conviction for any crime other than a first degree or capital felony. In this case, the Honorable Michael R. Murphy, Judge, Third Judicial District Court in and for Salt Lake County, State of Utah, rendered final judgment and conviction against Mr. Tucker for the crime of Theft, a third degree felony, in violation of Utah Code Ann. § 76-6-404 (1953 as amended).

STATEMENT OF THE ISSUE

Did the trial court commit reversible error when it allowed the prosecutor to elicit otherwise inappropriate details of the plea bargained conviction for attempted forgery overruling the objections of Mr. Tucker and refusing to grant a mistrial?

STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS

This is an appeal from a judgment and conviction for Theft, a third degree felony, in violation of Utah Code Ann. § 76-6-404 (1953 as amended). Following two days of trial, May 17 and 18, 1989, a jury acquitted Mr. Tucker of Burglary, Count II of the indictment, but found him guilty of Theft, Count III of the indictment. Judgment and conviction was imposed by the Honorable Michael R. Murphy of the Third Judicial District Court who then sentenced Mr. Tucker to zero to five years incarceration at the Utah State Prison and ordered him to pay a fine of $1,250 plus 25% surcharge. The court then stayed the prison sentence and placed Mr. Tucker on probation for thirty-six months with conditions of probation including payment of the fine; a six-month jail term; recoupment of attorney fees in the amount of $1,000; and participation in and completion of an alcohol treatment program to be sponsored by Orange Street. This appeal challenges the validity of the conviction for Theft.

STATEMENT OF THE FACTS

Randall D. Tucker, Appellant in this case, and co-defendant, Henry Kanares, were charged in a combined information of three counts each (R. 9-11). Count I involved a burglary of a small shed located at 1186 South Redwood Road in Salt Lake County which occurred on or about March 27, 1989. Count II involved a burglary of that same shed at the same location on or about March 29, 1989. Count III involved a theft from the same location

on or about March 29, 1989. Both parties originally pleaded not guilty to all three counts. Count I, however, was dismissed as against Appellant, Randall D. Tucker, at the preliminary hearing held in circuit court (R. 3-4).

The trial was scheduled May 17-18, 1989. On the morning of the first day of trial, co-defendant, Henry Kanares, opted to withdraw his pleas of not guilty and enter a plea of guilty to Count II of the Information (R. 45-51, 54). Counts I and III were then dismissed against him (R. 54). Appellant, Randall Tucker, insisting he was not guilty of the charges, proceeded to trial on Count II and Count III, the burglary and theft of property charges from the small shed located at 1186 South Redwood Road on or about March 29, 1989.

Prior to trial, Mr. Tucker filed a Motion in Limine to prohibit the State from introducing evidence of prior convictions against him (R. 55-56). That motion was argued to the court on the first day of trial (R. 123 at 2-15). The State insisted and the court agreed that a prior conviction of attempted forgery from 1988 would be admissible under Rule 609(a)(2) of the Utah Rules of Evidence as a crime of dishonesty or false statement (R. 123 at 11, 15). The trial court required that the official file of Mr. Tucker from that attempted forgery case be produced from the records department and examined (R. 123 at 9). Mr. Tucker had pleaded guilty to that charge, and, from that file, the trial court later placed into evidence State's Exhibit 16-S, the Affidavit of Defendant (R. 125 at 45). Based on that Affidavit of Defendant,

which detailed the plea agreement in that case including the element of intent to defraud, the trial court supported its ruling to deny Mr. Tucker's Motion in Limine (R. 123 at 11-15). Nonetheless, Mr. Tucker requested a continuing objection to the admission of the prior conviction evidence as impeachment testimony, and the same was granted (R. 123 at 15).

At trial, the testimony of Mr. Tucker disclosed that he had known Mr. Kanares for approximately one year prior to March 29, 1989 (R. 125 at 15). Co-defendant Kanares was a friend of his mother's boyfriend (R. 125 at 16). Mr. Tucker met Mr. Kanares through that relationship when Mr. Kanares asked Mr. Tucker to work as a mechanic to repair Mr. Kanares' automobile (R. 125 at 15-16). Mr. Tucker testified that on March 29, 1989, he examined Mr. Kanares' car and that the 29th was the only day he had ever actually been with Mr. Kanares (R. 125 at 16). After working on Mr. Kanares' car, he explained that he needed a ride home and that Mr. Kanares agreed to drive him to his home (R. 125 at 17). Mr. Tucker testified that enroute to his house, while traveling on Redwood Road, Mr. Kanares informed Mr. Tucker that he (Mr. Kanares) needed to stop and pick up some property (R. 125 at 17).

Mr. Kanares and Mr. Tucker then pulled into a large driveway off Redwood Road near a small shack just prior to noon. Mr. Kanares got out of the car and went to the shack. Mr. Tucker remained at the car (R. 123 at 19; R. 125 at 18). Within moments, a ninety-year-old man, later identified as Mr. Harvey D. Hansen, arrived at the property in his own automobile and parked behind that

of Mr. Kanares (R. 125 at 18-19). Mr. Hansen informed Mr. Tucker that it was his property and asked Mr. Tucker what they were doing there (R. 123 at 21; R. 125 at 19). Testimony of the parties differs from this point forward.

Mr. Hansen testified that the trunk of Mr. Kanares' car was opened and that property belonging to him and his son were within the trunk of the car and on the back seat (R. 123 at 17). He indicated that he knew what was going on--implying a burglary and theft--and that it was important he get a description of the car and the license plate (R. 123 at 22). Mr. Hansen testified that he then copied down the number of the license plate (R. 123 at 22). He testified that while he was noting the license plate number, another individual returned to the car from the shed (R. 123 at 28). He explained that Mr. Tucker and this other individual then got in the car and drove away (R. 123 at 22). He returned to his residence, called the Salt Lake City Police Department, and gave them the information including the license number (R. 123 at 23).

Salt Lake City police officers responded in a joint effort with West Valley City police officers to the address of Mr. Kanares, a trailer park in West Valley City (R. 125 at 7). At that residence, the officers located Mr. Kanares, the automobile, and ultimately Mr. Tucker, who had been hiding under a bed in a bedroom of the mobile home (R. 125 at 6). Mr. Hansen was brought to the property; he identified the automobile and some of the property within the automobile as belonging to himself and his son (R. 123 at 78-80). Mr. Kanares and Mr. Tucker were also identified and placed

under arrest (R. 123 at 79-81).

Mr. Tucker's testimony contradicted that of Mr. Hansen. He indicated that while at the residence on March 29, 1989, no property was actually placed in the automobile; that after Mr. Hansen had arrived at the address, Mr. Kanares informed Mr. Tucker that they needed to return to his place in West Valley City where Mr. Kanares began to load property from the residence into the automobile to return to the location on Redwood Road (R. 125 at 20-22). Mr. Tucker admitted that he had been found hiding under the bed in a bedroom at the trailer court and explained that he was scared at the sight of the police officers (R. 125 at 23). Mr. Tucker explained that he feared he would get into trouble, and on the suggestion of another, went in the bedroom to hide (R. 125 at 23). Mr. Tucker further testified that, to his knowledge, no crime had been committed. He admitted that once Mr. Hansen had arrived, he had a "bad inkling that something wrong was going on" but, at that point, was still unsure (R. 125 at 30). He further testified that it was he who actually read the number of the license plate to Mr. Hansen while Mr. Hansen wrote it down (R. 125 at 32).

During direct examination, Mr. Tucker admitted the attempted forgery conviction of 1988, indicating the nature of the circumstances surrounding the commission of that offense (R. 125 at 24-25). He explained that he had shared an account with his sister and that when she refused to release money to him, he forged her name on a check (R. 125 at 25). He affirmed that he had pled guilty to the crime (R. 125 at 25).

On cross-examination, the prosecutor questioned in detail Mr. Tucker's recollection of the attempted forgery conviction, soliciting from him information which exceeded that contained in the plea agreement and which included questioning about an alleged although uncharged cocaine drug involvement (R. 125 at 25-27). An objection was lodged with the court regarding the examination of the prosecutor into details of the prior conviction, specifically pointing out the Rule 404(b) violations inherent in such examination (R. 125 at 27). A side bar was held out of the hearing of the jury where Mr. Tucker additionally lodged a Motion for Mistrial, later placed on the record and denied by the trial court (R. 125 at 27, 39-43).

In support of the prosecution's case, Mr. Harvey D. Hansen's son, Thomas Franklin Hansen, was also called to testify. He identified property which had been taken from the shed at the Redwood Road address and substantiated the values of that property (R. 123, 48-49, 59). Thomas Hansen confirmed that the shed had been broken into on other occasions and specifically that the shed had been broken into several days before March 29 (R. 123 at 54).

Several police officers were also called as witnesses for the State. Daniel R. Despain, a Salt Lake City patrolman, testified that he was the officer who had accompanied Mr. Hansen, Sr. to West Valley City to the trailer home of Mr. Kanares. He substantiated that, at that premises, Mr. Hansen identified several pieces of property located in the automobile of Mr. Kanares (R. 123 at 80).

Grant Elsby, a West Valley City police officer, testified

that he was the first officer to arrive at the address of Mr. Kanares (R. 125 at 2-3, 8). He testified that upon entering the residence, Mr. Kanares denied the presence of another individual but, after seeking permission to look, he located Mr. Tucker hiding under a bed (R. 125 at 6). Officer Elsby further testified that upon arrival, two West Valley City Police cars showed up along with two, maybe three, from Salt Lake City (R. 125 at 7). He testified that several of the officers were uniformed (R. 125 at 8).

After the defense rested, the prosecutor asked for a short recess, during the conclusion of which he informed defense counsel he would call Mr. Kanares as a rebuttal witness. Over objection, Mr. Kanares testified on direct examination that he committed the March 29 burglary and that Mr. Tucker assisted him to move property from the inside of the shed to the outside and then to the automobile (R. 125 at 66). On cross-examination, Mr. Kanares admitted that he had told Mr. Tucker's counsel on no less than three occasions that Mr. Kanares had acted alone and that Mr. Tucker was not responsible for any criminal act (R. 125 at 69). Mr. Kanares testified that the State had not done anything to procure his testimony (R. 125 at 75). On recross-examination, he did acknowledge that two other third degree felony charges were dismissed against him by the State (R. 125 at 75).

The case was ultimately presented to the jury, who, after deliberations, acquitted Mr. Tucker of the burglary charge but convicted him of theft (R. 59, 60, 65-66). This appeal followed.

SUMMARY OF THE ARGUMENT

The trial court committed plain error and/or abused its discretion by permitting the State to cross-examine for impeachment purposes beyond the mere fact of the conviction. The trial court overruled an objection to the improper impeachment and also denied a Motion for Mistrial, both founded on Rule 404(b), erroneously ruling that the door had been opened on direct examination and that Rule 404(b) was inappropriate to the issue. Mr. Tucker did not open the door to such testimony; but even assuming he had, competent case authority forbids impeachment by prior conviction evidence to violate Rule 404(b). The trial court's erroneous ruling requires reversal of Mr. Tucker's conviction.

ARGUMENT

POINT

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY PERMITTING THE STATE TO INTRODUCE INAPPROPRIATE DETAILS AND ALLEGATIONS BEYOND THE PERMISSIBLE IMPEACHMENT EVIDENCE OF THE PRIOR CONVICTION OF ATTEMPTED FORGERY.

Prior to trial, Mr. Tucker filed a motion in limine to prohibit the State from using prior convictions of Mr. Tucker to impeach his testimony if he were to take the stand in his own behalf (R. 55-56). That motion was argued on the first day of trial out of the presence of the jury (R. 123 at 2-15). The court ruled that a 1988 misdemeanor conviction for attempted forgery would be appropriate for impeachment purposes and denied the motion (R. 123

at 12-15). Mr. Tucker sought and obtained a continuing objection to that ruling (R. 123 at 15).

Mr. Tucker testified in his own behalf and admitted the 1988 misdemeanor conviction of attempted forgery (R. 125 at 24-25). On cross-examination, the prosecutor questioned Mr. Tucker on unadjudicated details of the plea bargained conviction beyond the permissible scope of cross-examination for impeachment purposes (R. 125 at 25-27). The prosecutor also introduced contested claims of problems of cocaine usage by Mr. Tucker (R. 125 at 27). Mr. Tucker objected to the examination of the prosecutor; a side bar was held, and the court allowed the questioning to continue over the objection of Mr. Tucker (R. 125 at 27-29). (A verbatim reproduction of the attempted forgery examination is contained infra at subpoint D and attached at Addendum A.)

At the conclusion of Mr. Tucker's testimony, the defense rested and a recess was taken by the court (R. 125 at 38). On returning from the recess, out of the presence of the jury, Mr. Tucker made a motion for a mistrial previously reserved at the side bar noted above (R. 125 at 39-40). That mistrial motion complained that the prosecutor introduced information beyond the conviction of attempted forgery contrary to impeachment principles and evidence rule 404(b) (R. 125 at 40-41). The trial court denied the new trial motion ruling that Mr. Tucker had "opened the door" entitling the prosecution to address the questions asked on cross-examination (R. 125 at 41-42). The trial court then ruled that a copy of the affidavit from the 1988 attempted forgery case be

marked and made a part of the record instructing that it was not to be provided to the jury (R. 125 at 44-47; Exhibit 16-S).

Mr. Tucker avers that the trial court committed prejudicial error when it overruled his objection to the State's cross-examination beyond the mere fact of the conviction. The trial court also erred in denying the motion for a mistrial as the prosecutor had improperly introduced allegations of drug usage into the prior conviction of attempted forgery. Mr. Tucker urges that he did not open the door to such testimony; but even assuming he had opened the door, the cross-examination of the prosecutor exceeded permissible impeachment and violated Rule 404(b) of the Utah Rules of Evidence prejudicing the jury against him.

A. MR. TUCKER'S 1988 CONVICTION FOR ATTEMPTED FORGERY IS A CRIME OF DISHONESTY OR FALSE STATEMENT.

Subsequent to Mr. Tucker's trial, this Court held in State v. Ross, 782 P.2d 529, 530-31 (Utah App. 1989), that a prior conviction for attempted forgery is automatically admissible for impeachment purposes under Rule 609(a)(2) of the Utah Rules of Evidence. Mr. Tucker acknowledged in his Affidavit of Defendant when pleading guilty to the attempted forgery the element of "purpose to defraud." He now concedes the prior conviction was admissible for impeachment purposes.

Despite that concession, however, prejudicial error occurred in his case when the prosecutor exceeded permissible impeachment practices by going beyond the facts of the case as

articulated in the plea bargain agreement and introduced other crimes, wrongs or acts contrary to Rule 404(b) of the Utah Rules of Evidence.

B. IMPEACHMENT BY PRIOR CONVICTION EVIDENCE IS LIMITED TO NARROW INQUIRIES ONLY.

A long established principle of jurisprudence recognizes that impeachment by prior conviction evidence must be limited to questioning the defendant on the narrow area of conviction, nature of the crime and punishment. United States v. Wolf, 561 F.2d 1376 (10th Cir. 1977). Some courts have offered variations of the permissible cross-examination by allowing questions into the subject of crime, date and disposition, see Campbell v. Greer, 831 F.2d 700 (7th Cir. 1987), and cases cited therein, and a few courts have allowed questioning regarding the length of confinement. United States v. Barnes, 622 F.2d 107 (5th Cir. 1980), and cases cited therein.

Courts have routinely cautioned that care must be taken during impeachment by prior conviction evidence to not permit counsel to explore the details of a witness' past convictions, United States v. Castro, 788 F.2d 1240 (7th Cir. 1986), and further indicated the scope of the cross-examination should be so limited to avoid the confusion of collateral issues and to avoid unfairness to the defendant. United States v. Roenigk, 810 F.2d 809, 814-15 (8th Cir. 1987).

The above-noted rule acknowledging that it is error to

inquire about the details of prior criminal conduct is so well established that such error is cognizable despite the absence of any objection by defense counsel. United States v. Harding, 525 F.2d 84, 88-89 (7th Cir. 1975) (citing United States v. Dow, 457 F.2d 246, 250 (7th Cir. 1972); United States v. Mitchell, 427 F.2d 644, 647 (3rd Cir. 1970); and United States v. Pennix, 313 F.2d 524, 531 (4th Cir. 1963). Courts have further held that a cautionary instruction limiting the scope of the permissible impeachment by prior conviction evidence cannot correct the error and obviate the prejudice to the defendant. United States v. Dow, 457 F.2d 246, 248-49 (7th Cir. 1972).

Courts have identified that the problem with excessive references to details of prior criminal conduct is that the jury is likely to infer that the defendant is more likely to have committed the offense for which he is being tried than if he had previously led a blameless life. United States v. Harding, 525 F.2d 84, 89 (7th Cir. 1975); see 1A J. Wigmore, Evidence § 57 at 1185 (Tillers rev. 1983) ("The deep tendency of human nature to punish not because our victim is guilty this time but because he is a bad man and may as well be condemned now that he is caught is a tendency that cannot fail to operate with any jury, in or out of court."); see, also, United States v. Roenigk, 810 F.2d 809, 815 (8th Cir. 1987).

C. AN EXCEPTION TO THE GENERAL RULE EXISTS BUT THAT EXCEPTION IS LIMITED BY CONSIDERATIONS OF FUNDAMENTAL FAIRNESS AND UNDUE PREJUDICE AS GUIDED BY EVIDENCE RULES 403 AND 404.

Importantly, an exception to the above rule which limits the prosecutor's ability to query into details of the conviction has been noted as "whenever defendant attempts to explain away the effect of a conviction or to minimize his guilt, [he] may be cross-examined on any facts relevant to direct examination." United States v. Amahia, 825 F.2d 177, 179 (8th Cir. 1987). See, also, United States v. Wolf, 561 F.2d 1376 (10th Cir. 1977) (defendant has no right to set forth to the jury all of the facts which tend in his favor without laying himself open to cross-examination on those facts); United States v. Barnes, 622 F.2d 107, 109 (5th Cir. 1980) (prosecutor permitted to elicit length of incarceration from defendant in response to defendant's attempt to "explain away" his prior conviction).

This exception to the general rule--forbidding examination into details of the prior convictions unless the defendant attempts to "explain away" the conviction--is itself limited. Courts have explained that while room is allowed for prosecutors to counter a defendant's attempt to "explain away" a conviction, care must be taken during that cross-examination to avoid Rule 404(b) problems. United States v. Wolf, 561 F.2d 1376, 1380-81 (10th Cir. 1977) (trend to restrict prejudicing prior conviction evidence culminated in adoption of Rules 609, 404(b) and 103(d) of the Rules of Evidence; care should be taken to protect the accused from being

convicted because of past conduct and not the current charges); United States v. Tumblin, 551 F.2d 1001, 1004-05 (5th Cir. 1977) (evidence of prior convictions is to be considered for impeachment purposes only, and theme permitting the conviction to establish conformity with criminal behavior requires reversal).

D. THE EXAMINATION OF MR. TUCKER REGARDING HIS PRIOR CONVICTION FOR ATTEMPTED FORGERY VIOLATED PROPER IMPEACHMENT PRINCIPLES TO HIS DETRIMENT.

At the conclusion of Mr. Tucker's direct examination, his counsel questioned him as follows:

Q (By Ms. Wells) Mr. Tucker, have you previously been convicted of any criminal offenses?

A Yes.

Q And what was that offense and when?

A In March of 1988 I was convicted of a forgery, attempted forgery. Attempted forgery, Class A misdemeanor.

Q And that was a misdemeanor rather than a felony?

A Yes.

Q Would you please explain briefly the circumstances surrounding that offense and your ultimate conviction? Let me ask: Did you enter a plea in that matter?

A Yes.

Q What were the circumstances surrounding that case?

A My sister and I were sharing a house, and I was putting my money into her bank account. We had a dispute and I wanted my money out of her account. It's a joint account with my mother's name on the checks.

She wouldn't refund my money, my parents were on vacation and I needed my money cause I was moving out of the house. And in order to get another house I needed my money. So I forged my sister's signature to get my money.

Q How much money was involved?

A Less than $100.

Q Again, did you enter a plea of guilty after being charged with that offense?

A Yes.

(R. 125 at 24-25). Direct examination was then completed and the prosecutor began his cross-examination.

Q [by Mr. Jones] Mr. Tucker, do you think you have a good recollection of the case for which you pled guilty to?

A Do I--

Q The attempted forgery that you just talked about to the jury?

A Oh, yes.

Q Isn't it true that you stole five checks from your mother?

A Yes.

Q One of the checks--the one you pled guilty to was in excess of $500, wasn't it?

A I think so.

Q So you are not telling the Jury that you stole $100, are you?

A No.

Q How much, all totaled, did you steal from your mother through those checks?

A Number one, I didn't steal it. It was my money.

Q Well, you took checks, you stole blank checks from your mother, didn't you?

A I did.

Q And you forged her signature on five of those?

A I did.

Q How much money did you take?

A I would say around six hundred something.

Q You are telling us that the one check was in excess of $500 and the other four altogether only totaled $100?

A There was a few that were not cashed. There was one in my wallet that had never been cashed.

Q Well, isn't it true that you had had these checks for some time?

A Yes.

Q How long had you had these checks?

A Probably three days.

Q You didn't have them more like three months?

A I don't think so.

Q Isn't it true that the reason that you took the checks and cashed them was to support your drug habit?

A No.

MS. WELLS: Your Honor, I would object--I would ask the Court for a ruling and would like to approach the Bench.

THE COURT: I'm going to overrule the objection. The door has been opened as to the purpose for the money on direct examination.

MS. WELLS: I don't believe that the door was opened in that it wasn't asked of him for what purpose. He merely said it was his money. And I think what this does is goes to a rule of evidence 404 problem.

THE COURT: Do you need to proceed further on this?

MR. JONES: I do, Your Honor.

THE COURT: Let's come to the side bar for just a moment.

(Bench conference off the record.)

THE COURT: The objection is overruled.

Q (By Mr. Jones) Mr. Tucker, is it your testimony to the Jury that the only reason you took those five checks is because you were entitled to the money?

A Yes.

Q Do you remember filling out a statement, kind of a questionnaire or statement why you took that money?

A To a certain degree, yes.

Q Did you ever tell anyone in that statement that the reason you took the money was to support a drug habit?

A I can't remember.

Q Were you on cocaine in April of 1988?

A Had I used cocaine?

Q Yes.

A A few times, yes.

Q Did you have a drug problem?

A Not really a problem.

Q Well, have you entered or been ordered to go into a drug rehabilitation program?

A I completed it, yes.

Q Did you complete the program?

A Yes.

Q And when was that?

A I was ordered in, I think, June of 1988, to go.

Q Was it your testimony that you didn't have a drug problem at the time you entered that plea?

A No. I entered a plea of guilty.

Q Excuse me, in April of 1988--

A Yes, sir.

Q --you had a drug problem at that time?

A It was going to become a problem, yes.

Q What about in March of 1989?

A I have been clean for over a year.

Q You were unemployed at the time of this incident?

A Yes.

Q And it's your testimony that you just happened to be in the wrong place at the wrong time on March 29, 1989?

A So to speak.

Q You had no idea what your friend was up to?

A Exactly.

Q You weren't on drugs that day?

A No.

Q Is it true that the only person who was hiding when the officers got there was yourself?

A Yes, sir.

Q And your testimony is that Mr. Kanares is the one who was responsible for this burglary and theft; is that right?

A Yes.

Q But he wasn't hiding, was he?

A No, he was not.

Q And the only reason you were hiding is because you were afraid?

A That, and I had a speeding ticket that had went to a warrant, and I have done thirty days in jail on the forgery, and I had no desire to go back to jail.

Q You weren't hiding, I guess, because of what happened over at Mr. Hansen's property?

A No. At the time on the forgery I was beat up real bad by the police, and again that same day.

(R. 125 at 25-29).

At the first opportunity following Mr. Tucker's testimony, a Motion for Mistrial--previously reserved at the side bar noted above--was placed on the record (R. 125 at 38-41). Counsel expressly stated her concerns regarding 404(b) violations which prejudiced Mr. Tucker (R. 125 at 40-41). The trial court disagreed and responded that Rule 404(b) was not appropriately involved in the consideration; he denied the Motion for Mistrial (R. 125 at 41-42). (The motion as placed on the record and the court's ruling are reproduced at Addendum B.)

E. THE TRIAL COURT'S RULING CONSTITUTES REVERSIBLE ERROR.

Several problems exist with the trial court's ruling to permit the deviation from the normal rule in this case. First, the prior conviction in this case involved a plea bargained adjudication and not a conviction following a trial. The trial court expressly

recognized this fact earlier in the case when it sent the court bailiff to the record department for the official file in this case and removed from that file and had placed into evidence a copy of the Affidavit of Defendant, the plea agreement in this case (R. 123 at 7-10; R. 125 at 44-45). That agreement indicates that the prior conviction of Mr. Tucker for attempted forgery establishes the elements as follows:

> Defendant attempted to make, complete, execute, authenticate, issue, or utter a check having a face amount less than $100.00 so that such purported to be the act of another, with the purpose to defraud.

State's Exhibit 16-S; see Addendum C. The facts of the case are listed as:

> Defendant presented a check for cashing knowing it was forged and he had no permission.

State's Exhibit 16-S; see Addendum C.

The additional questioning brought out on cross-examination by the prosecutor in this case exceeded the adjudicated facts. Rule 609 clearly indicates, as do the cases noted above, that only convictions are permissible inquiry during impeachment by cross-examination. It has been long established that neither arrests nor unlitigated allegations are a permissible basis for impeachment evidence. United States v. Pennix, 313 F.2d 524, 529 (4th Cir. 1963).

The Utah Supreme Court has discussed the problem of attempting to impeach a witness with the unlitigated details of a plea bargained prior conviction. In Terry v. ZCMI, 605 P.2d 314, 323 (Utah 1979), the Supreme Court affirmed the trial court's

decision that considerations of delay, confusion of issues, the potential for misleading the jury, and prejudice to the defendant warranted exclusion of the "substantive facts" of a plea bargained conviction because it would result in a retrial of the case. The Court stated:

> The prior arrest was followed by a guilty plea by the plaintiff. Due to the lack of a trial on the merits in the first instance many controverted points concerning that incident would have to be tried for the first time at the present proceeding.

Id. at 323 n.29.

The Affidavit of Defendant comprised the adjudicated facts of the attempted forgery conviction. Mr. Tucker pleaded guilty to one forged check of an amount less than one hundred dollars. See Addendum C. The prosecutor, however, introduced the jurors to five checks with a total value of six hundred dollars (R. 125 at 25-26). Additionally, he wrongly characterized the amount of the forged check contained in the plea bargained conviction as a check in excess of five hundred dollars rather than a check of less than one hundred dollars. Compare R. 125 at 26 with Addendum C. Finally, the prosecutor introduced a new crime or wrong into the attempted forgery conviction by referring to the theft of the five checks and managing to reiterate the words "stole," "steal" or "took" on no less than eight occasions during the supposed impeachment inquiry (R. 125 at 25-28).

While the above unadjudicated details were not specifically objected to at trial, Mr. Tucker now insists their presentation to the jurors constituted plain error. He urges that this Court agree

with the concerns noted by the Court in Terry v. ZCMI that the State not be permitted to try its attempted forgery case for the first time as a part of the theft case against him.

Second, the impeachment rule, Rule 609 of the Utah Rules of Evidence, focuses on credibility concerns only. At issue in impeachment evaluations is whether the defendant may take the stand and testify untruthfully. The jury is entitled to be aware of only those convictions which may impugn his credibility. See State v. Bruce, 779 P.2d 646, 653-56 (Utah 1989); State v. Lanier, 778 P.2d 9, 11 (Utah 1989); State v. Banner, 717 P.2d 1325, 1333-35 (Utah 1986); see, also, United States v. Roenigk, 810 F.2d 809 (8th Cir. 1987); United States v. Harding, 525 F.2d 84 (7th Cir. 1975). Even assuming that Mr. Tucker's testimony can be categorized as an attempt to explain away or minimize his conviction, the ability of the prosecutor to introduce other details beyond the plea bargained conviction must be consistent with the impeachment purpose. As noted above, impeachment inquiries are appropriately proscribed whenever such evidence may be misused to prove conformity with the purported bad character of a person. Rule 404(b), Utah Rules of Evidence (1983); see subpoint C, supra. The prosecutor's questions in this case went beyond impeachment in an attempt to establish bad character in violation of Rule 404(b) of the Utah Rules of Evidence.

Mr. Tucker specifically objected based on Rule 404(b) claiming that the allegations of cocaine usage coupled with unemployment charges directly implicated bad character prohibited by Rule 404(b). The objection to this questioning should have been

sustained and the Motion for Mistrial should have been granted. This issue is properly preserved for appeal and may be decided on an abuse of discretion standard.

Rule 404(b) of the Utah Rules of Evidence states:

> (b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404(b), Utah Rules of Evidence (1983). Neither the rule itself nor interpretations of the rule under Utah case law allows the comparison of periods of unemployment nor introduction of drug (cocaine) usage into this case for any reason, let alone for impeachment purposes. In State v. Featherson, 781 P.2d 424 (Utah 1989), the Supreme Court stated that evidence of other crimes, wrongs or acts may be admitted only if such evidence has "a special relevance to a controverted issue and is introduced for a purpose other than to show the defendant's predisposition to criminality." Id. at 426 (quoting State v. Shickles, 760 P.2d 291, 295 (Utah 1988) citing State v. Saunders, 699 P.2d 738, 741 (Utah 1985)).

Relying on State v. Featherson, this Court reiterated that other crimes evidence that passes the 404(b) test (i.e., relevant beyond proving mere criminal disposition) is still subject to the protections of Rule 403 of the Utah Rules of Evidence. State v. Cox, 127 Utah Adv. Rep. 19 (Ct. App. January 31, 1990). Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 403, Utah Rules of Evidence (1983). The application of Rule 403 requires balancing the probative value of the questioned evidence against the danger of unfair prejudice; the balancing contemplates considerations such as the need for the evidence and the degree to which the evidence probably will rouse the jury to overmastering hostility. State v. Cox, 127 Utah Adv. Rep. at 19 (citing State v. Shickles, 760 P.2d at 295).

The Utah Supreme Court has defined the notion of "unfair prejudice" as follows:

> The term "prejudicial" should be construed to mean inflammatory in the sense that the jury may use the conviction against the defendant for purposes other than determining the defendant's credibility, and therefore would tend to induce the jury to render a verdict outside the relevant substantive evidence bearing on the material elements of the crime.

State v. Slowe, 728 P.2d 110, 112-13 (Utah 1986). The trial court's ruling permitted the State, under the guise of impeachment, to examine Mr. Tucker in a method which placed before the jurors information purposed to inflame them against Mr. Tucker and to induce a decision outside the relevant evidence and pertinent facts of the theft case before them.

Contrary to rules 404(b) and 403, the State was allowed to inquire into details, and obtain at least partial admissions, on information unrelated to impeachment. The State's examination into

unadjudicated details of other crimes or wrongs not part of the plea bargained conviction, particularly the allegations of cocaine usage to the level of a drug habit, were highly improper under the circumstances of this case. These errors not only resulted in violations of rules 403 and 404(b), they also abrogated fundamental rights guaranteed Mr. Tucker under federal and state constitutional provisions assuring him due process and the right to a fair trial. United States Constitution, Amendments V, VI and XIV; Utah Constitution, Article I, §§ 7 and 12.[1]

In United States v. Harding, 525 F.2d 84 (7th Cir. 1975), the circuit court made the following observation in support of its decision to reverse the conviction of the accused:

> The rule that it is error to inquire about the details of prior criminal conduct is so well established that such error is cognizable despite the absence of any objection by defense counsel.

Id. at 88-89. In Harding, the court found error even in the absence of an objection to the prosecutor's questions which in part implied that the defendant had testified falsely about his prior conviction. The court stated:

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[1] Notably, our Supreme Court has repeatedly indicated that Utah's due process clause may well exceed the protections afforded under the federal counterpart. See, e.g., State v. Watts, 750 P.2d 1219, 1221 n.8 (Utah 1988); State v. Earl, 716 P.2d 803, 806 (Utah 1986). The Court actually has already extended Utah's due process protections safeguarding against the prejudicing effect of other crimes evidence in another context. State v. Saunders, 699 P.2d 738, 742 (Utah 1985) (citing State v. McCumber, 622 P.2d 353 (Utah 1980) (due process violated when prejudicial other crimes evidence reaches the jury where severance would have cured the prejudice).

> In addition to the improper inquiry about details of the prior offense, some of the prosecutor's questions implied that appellant testified falsely about the offense even though the prosecutor knew, or certainly should have known, that his testimony was accurate. Thus, he asked if the offense was not possession with intent to distribute, rather than simple possession, and later, whether the defendant was not mistaken in his description of the offense. It is true, of course, that possession of 80 pounds of marijuana strongly implied guilt of possession with an intent to distribute, but this fact does not justify the federal prosecutor's misdescription of the charge which the State of Indiana elected to prosecute. The misdescription was prejudicial in two ways: first, it characterized the earlier offense as somewhat more serious than it actually was; second, and of greater importance, it improperly implied that the prosecutor knew the witness was lying when, in fact, he knew that the witness was telling the truth.

Id. at 90-91.

As in Harding, the prosecutor in this case improperly implied that Mr. Tucker had lied when he failed to admit more than one check and an amount over one hundred dollars. The Harding Court acknowledged this type of behavior as establishing greater prejudice than the implication that the crime was more serious than it was. Both problems are present in the case at bar. As in Harding, this Court should find plain error in the trial court's ruling allowing the detailed cross-examination into the facts of other checks and amounts beyond the plea bargained conviction.

In United States v. Roenigk, 810 F.2d 809 (8th Cir. 1987), the Court of Appeals reversed a conviction because the prosecutor had exceeded permissible impeachment principles by excessive exploration of the details behind the impeaching prior conviction. The Roenigk Court explained that excessive references to details of

prior criminal conduct improperly allows jurors to infer a defendant is more likely to have committed the charged offense. Id. at 815. The Court stated that such behavior by the government "may be so prejudicial as to amount to plain error." Id. at 814.

At issue in Roenigk was a relationship between the defendant and a known drug trafficker. The amount of emphasis placed on this relationship and the crimes of the drug trafficker improperly allowed the jurors to consider and find the defendant was more likely to have committed the crime of perjury; the court called this possibility an improper basis and reversed under both plain error and an abuse of discretion standard. Id. at 816.

In United States v. Tumblin, 551 F.2d 1001 (5th Cir. 1977), the prosecutor examined the defendant about details behind his convictions including length of confinement, periods between confinement and defendant's unemployment between crimes. Id. at 1002. The Court found the questions regarding the unemployment status of the defendant between crimes to particularly exceed the scope of reasonable cross-examination. The Court stated:

> The obvious significance of this questioning was not to damage defendant's credibility as a witness--the fact of conviction alone achieved that goal--but instead to suggest, quite improperly, that defendant was a man who had spent most of his young life committing and serving time for the crimes, rather than being gainfully employed.

Id. at 1004.

While Mr. Tucker's criminal history in no way parallels that of appellant Tumblin, the prosecutor's use of this type of questioning on cross-examination in this case--connecting the prior

conviction and alleged drug habit to an assertion of drug usage and unemployment in connection with the instant offense--was in no way lost on the jury. The effect on Mr. Tucker was the same as in Tumblin; the accused's substantial rights were prejudiced. In Tumblin, the Court rejected a claim of harmless error and found reversible error to have occurred. This Court should similarly find.

Notably, in both United States v. Harding and United States v. Roenigk, the courts noted that a limiting instruction had not been given. 525 F.2d at 91, and 810 F.2d at 816 n.2, respectively. In neither case was this concern the dispositive factor. Id. However, the court in United States v. Dow, 457 F.2d 246 (7th Cir. 1972), examined this issue directly. The Dow court noted that questions aimed at obtaining details beyond the mere fact of the conviction itself to show a pattern of conduct and inflame the jury is reprehensible, amounts to plain error, and does such extensive and serious damage that the harm cannot be removed by a cautionary instruction limiting the use of the information. Id. at 250. Therefore, the fact that the trial court sua sponte provided a limiting instruction to jurors at the time of the impeachment (R. 125 at 34) and then again in general instructions (R. 79) can in no way obviate the prejudice inherent in the prosecutor's improper examination.

In State v. Eldredge, 773 P.2d 29 (Utah 1989), the Utah Supreme Court observed that the requirements for finding plain error, obviousness and harmfulness, pose no rigid and insurmountable barrier for review. Id. at 35 n.8. The above discussion

demonstrates both requirements have been met on the facts of this case and that the substantial rights of Mr. Tucker have been violated. Similarly, the above cases go a long way to establish that the trial court abused its discretion in overruling the objection lodged by Mr. Tucker and in denying his Motion for Mistrial. Notably, the Roenigk court found an abuse of discretion by the trial court for failing to sustain the objection to testimony which presented evidence of an alleged drug involvement between the defendant and a known drug dealer and which bore no relationship to the charged crime or impeachment under Rule 609(a). 810 F.2d at 815-16.

The Utah Supreme Court has stated that where a reasonable likelihood exists that the error complained of affected the outcome of the trial, eroding confidence in the verdict and suggesting that absent the error more than a mere possibility exists that the defendant would obtain a more favorable result, reversal of the conviction is warranted. State v. Verde, 770 P.2d 116, 122 (Utah 1989); State v. Knight, 734 P.2d 913, 919-20 (Utah 1987). This case is such a case. Numerous reasons exist to establish the erosion of confidence necessary to merit a new trial.

Notably, recent cases from the Utah Supreme Court demonstrate a strong aversion to the gratuitous admission of evidence of prior crimes, wrongs or acts. State v. James, 767 P.2d 549, 556-57 (Utah 1989); State v. Bishop, 753 P.2d 439, 494-98 (Utah 1988) (Zimmerman, J., concurring opinion, joined by Stewart, J., and Durham, J.); State v. Lanier, 778 P.2d 9, 10-11 (Utah 1989);

State v. Saunders, 699 P.2d 738, 741 (Utah 1985). See, also, State v. Cox, 127 Utah Adv. Rep. 19, 19-20 (Ct. App. January 31, 1990) (prior unprosecuted sexual assaults not so unique nor current enough to outweigh prejudice inherent in admission into evidence; reversal required).

Also, the State's case was far from overwhelming. The jury acquitted Mr. Tucker of the burglary charge despite the co-defendant's testimony that Mr. Tucker assisted in the burglary and the theft (R. 125 at 66). No doubt this fact strongly states that the testimony of Mr. Kanares was ignored by the jurors inasmuch as he admitted informing defense counsel on three separate occasions that Mr. Tucker was not involved in the crimes and that his story changed only after the State dismissed two other third degree felony charges against him (R. 125 at 69, 75). Other than Mr. Kanares' testimony, the case against Mr. Tucker was wholly circumstantial.

Admittedly, evidence was adduced by Mr. Tucker himself that he was present at the Redwood Road address and that he was later found hiding under a bed at the Kanares' residence where stolen property was found in Mr. Kanares' car (R. 125 at 17-23). This evidence, however, does not establish the crime of theft. Mr. Tucker's explanations for his behavior were consistent with innocence. Because of the circumstantial nature of the case against him, Mr. Tucker's testimony was crucial to the defense. When the State introduced evidence of other thefts, the five checks, and allegations of drug addiction to cocaine, the jurors probably utilized this information to reject his testimony and determine

guilt based on his purported bad character. Importantly, the State reiterated these improper charges in closing argument as well (R. 125 at 83-84). This erroneous information therefore improperly tipped the balancing of deliberations against Mr. Tucker.

Admission of the drug addiction over the objection of Mr. Tucker may have single-handedly assured the conviction against him. Few crimes today carry the stigma associated with drugs and particularly drug addiction. The prosecutor's inquiry into a court-ordered attendance at a drug program implied a measure of addiction which jurors may have inferred as incurable and no doubt used in considering his propensities toward deviant behavior. These feelings were only exacerbated when the prosecutor erroneously linked the past drug admissions to his current status as an unemployed and possibly reformed addict.

Such contentions presented to the jurors adversely affected Mr. Tucker's rights to obtain a fair trial from an impartial jury. The prosecutor's introduction of his information violated due process as guided by evidence rules 404(b) and 403. The trial court erroneously overruled meritorious objections to the introduction of this damaging and misleading evidence and improperly denied Mr. Tucker's Motion for Mistrial. These errors erode confidence in the outcome of the trial. Absent the errors, a reasonable likelihood exists that the outcome would have been more favorable to Mr. Tucker. It follows that his conviction should be reversed and a new trial ordered.

CONCLUSION

For all or any of the foregoing reasons, Mr. Tucker respectfully requests that this Court reverse his improperly obtained conviction and remand his case to the district court for dismissal of the charges or a new trial absent such errors.

Respectfully submitted this 27th day of March, 1990.

BROOKE C. WELLS
Attorney for Defendant/Appellant

RICHARD G. UDAY
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, RICHARD G. UDAY, hereby certify that eight copies of the foregoing will be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 27th day of March, 1990.

RICHARD G. UDAY

DELIVERED by _____

this _____ day of March, 1990.

_____

ADDENDUM A

shed or shop?

A No.

Q Did you at any time ever have in your possession or take any items of property which have been identified as belonging to Mr. Hansen and having come at some time from that shed?

A No. I had never seen the property until it was taken out of the trailer by the police officers.

Q Did you have further plans of your own that afternoon?

A I did.

Q What were they?

A I had a job interview at 3:30 with West Valley Transmissions.

Q Were you able to keep that?

A No.

MR. JONES: Objection as to relevance.

THE COURT: Sustained. That will be stricken.

Q (By Ms. Wells) Mr. Tucker, have you previously been convicted of any criminal offenses?

A Yes.

Q And what was that offense and when?

A In March of 1988 I was convicted of a forgery, attempted forgery. Attempted forgery, Class A misdemeanor.

Q And that was a misdemeanor rather than a felony?

A Yes.

Q Would you please explain briefly the circumstances

surrounding that offense and your ultimate conviction?

Let me ask: Did you enter a plea in that matter?

A Yes.

Q What were the circumstances surrounding that case?

A My sister and I were sharing a house, and I was putting my money into her bank account. We had a dispute and I wanted my money out of her account. It's a joint account with my mother's name on the checks.

She wouldn't refund my money, my parents were on vacation and I needed my money cause I was moving out of the house. And in order to get another house I needed my money. So I forged my sister's signature to get my money.

Q How much money was involved?

A Less than $100.

Q Again, did you enter a plea of guilty after being charged with that offense?

A Yes.

MS. WELLS: That's all the questions I have.

CROSS-EXAMINATION

BY MR. JONES:

Q Mr. Tucker, do you think you have a good recollection of the case for which you pled guilty to?

A Do I--

Q The attempted forgery that you just talked about to the Jury?

A Oh, yes.

Q Isn't it true that you stole five checks from your

mother?

A Yes.

Q And forged her name on those checks, didn't you?

A Yes.

Q One of the checks--the one you pled guilty to was in excess of $500, wasn't it?

A I think so.

Q So you are not telling the Jury that you stole $100, are you?

A No.

Q How much, all totaled, did you steal from your mother through those checks?

A Number one, I didn't steal it. It was my money.

Q Well, you took checks, you stole blank checks from your mother, didn't you?

A I did.

Q And you forged her signature on five of those?

A I did.

Q How much money did you take?

A I would say around six hundred something.

Q You are telling us that the one check was in excess of $500 and the other four altogether only totaled $100?

A There was a few that were not cashed. There was one in my wallet that had never been cashed.

Q Well, isn't it true that you had had these checks for some time?

A Yes.

Q How long had you had these checks?

A Probably three days.

Q You didn't have them more like three months?

A I don't think so.

Q Isn't it true that the reason that you took the checks and cashed them was to support your drug habit?

A No.

MS. WELLS: Your Honor, I would object-- I would ask the Court for a ruling and would like to approach the Bench.

THE COURT: I'm going to overrule the objection. The door has been opened as to the purpose for the money on direct examination.

MS. WELLS: I don' t believe that the door was opened in that it wasn't asked of him for what purpose. He merely said it was his money. And I think what this does is goes to a rule of evidence 404 problem.

THE COURT: Do you need to proceed further on this?

MR. JONES: I do, Your Honor.

THE COURT: Let's come to the side bar for just a moment.

(Bench conference off the record.)

THE COURT: The objection is overruled.

Q (By Mr. Jones) Mr. Tucker, is it your testimony to the Jury that the only reason you took those five checks is because you were entitled to the money?

A Yes.

Q Do you remember filling out a statement, kind of a questionnaire or statement why you took that money?

A To a certain degree, yes.

Q Did you ever tell anyone in that statement that the reason you took the money was to support a drug habit?

A I can't remember.

Q Were you on cocaine in April of 1988?

A Had I used cocaine?

Q Yes.

A A few times, yes.

Q Did you have a drug problem?

A Not really a problem.

Q Well, have you entered or been ordered to go into a drug rehabilitation program?

A I completed it, yes.

Q Did you complete the program?

A Yes.

Q And when was that?

A I was ordered in, I think, June of 1988, to go.

Q Was it your testimony that you didn't have a drug problem at the time you entered that plea?

A No. I entered a plea of guilty.

Q Excuse me, in April of 1988--

A Yes, sir.

Q --you had a drug problem at that time?

A It was going to become a problem, yes.

Q What about in March of 1989?

A I have been clean for over a year.

Q You were unemployed at the time of this incident?

A Yes.

Q And it's your testimony that you just happened to be in the wrong place at the wrong time on March 29, 1989?

A So to speak.

Q You had no idea what your friend was up to?

A Exactly.

Q You weren't on drugs that day?

A No.

Q Is it true that the only person who was hiding when the officers got there was yourself?

A Yes, sir.

Q And your testimony is that Mr. Kanares is the one who was responsible for this burglary and theft; is that right?

A Yes.

Q But he wasn't hiding, was he?

A No, he was not.

Q And the only reason you were hiding is because you were afraid?

A That, and I had a speeding ticket that had went to a warrant, and I have done thirty days in jail on the forgery, and I had no desire to go back to jail.

Q You weren't hiding, I guess, because of what happened over at Mr. Hansen's property?

A No. At the time on the forgery I was beat up real bad by the police, and again that same day.

Q When did you know or realize that this property was stolen?

ADDENDUM B

indicated to the Court at the side bar during the first break that I would like an opportunity to make a record and to make a further motion.

THE COURT: Right.

MS. WELLS: Your Honor, at this time I would make a motion for a mistrial. The defendant made an appropriate motion in limine prior to the beginning of the trial, which was subsequently heard and ruled on by the Court.

Although the Court did not grant that motion, it was clearly, I believe, the order of the Court that such admission by Mr.Tucker, should he testify, and of course under the case law he is required to testify in order to get the benefit of the motion and preserving it for appeal, and during that testimony he admitted to the conviction for attempted forgery, a Class A misdemeanor.

He was not requested on direct examination to make any explanation beyond admission of the fact of the forgery itself, which constitutes the crime. However, on cross-examination Mr. Jones elicited from him additional information which I believe was elicited contrary to the ruling of the Court, contrary to the spirit of the motion in limine, and in violation of Rule 404, the Utah Rules of Evidence, particularly subsection B dealing with other crimes, wrongs, or acts.

It indicates therein that evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as

proof of motive, opportunity, intent, preparation, plan, knowledge, identity or a sense of mistake or accident.

There is no exception listed within 404B that deals with the requirement that he explain one act by having to then admit to some other wrong that could not otherwise fit into Rule 404.

It was clearly the intent of the prosecution to use that information to further inflame the Jury and indicate to them that this was a person of bad character, more likely to have engaged in criminal activity in March of 1989, than not.

That is particularly true in light of the specific reason for which he might be impeached upon testifying, which is to cast doubt based upon that particular crime itself, as to credibility. The crime that he talked about paying drug debts obviously deals with a different type of offense that is not contemplated in the arguments made to the Court or in the Court's ruling and its analysis under the Banner test. It was merely thrown in as an addition by counsel, and it constitutes unfair prejudice and should warrant a mistrial by the Court.

THE COURT: All right. I have had plenty of time to think about this, and the record should reflect that while not to this extent, the matters were discussed at the side bar conference and a proffer at the time of the objection was made, was noted, and it was not on the record because it was at the side bar. I overruled that objection, and I am going to deny the motion for a new trial for the

following reasons: Under normal circumstances the prosecution, based on my ruling, has the right to have before the Jury the fact of the conviction and what the conviction was for. In this particular case, however, as a matter of strategy, and appropriate strategy, the defendant through his counsel sought to bring up the information before the prosecution had an opportunity to. That is a strategic choice, and it's probably a good one. But in so doing it was not just a statement of conviction and what the conviction was for. There was furthermore testimony elicited by direct examination as to what the purpose was for the act underlying the conviction in question.

Once that was done, the door was opened for the prosecution to do more than it was otherwise entitled to do. My memory of that testimony was that Mr. Tucker went into the purposes for which he wrote bad checks. Once he did that, then the prosecution is entitled to ask questions on cross to address the question of the purposes for the withdrawals of money.

As far as I'm concerned, that's all Mr. Jones did. Furthermore, and for that reason, I don't think 404B is pertinent because it was related not to additional wrongs or act, but instead was related only to the conviction in question, and in attempting to cross-examine Mr. Tucker on the reasons for the withdrawals. For that reason I think your 404B is not appropriate, so the motion is denied.

MS. WELLS: May I just indicate one more thing, Your Honor?

ADDENDUM C

In the District Court of the Third Judicial District

State of Utah

JUL 11 1988

THE STATE OF UTAH,
Plaintiff

vs.

Bardall Tucker
Defendant

By D L Lindberg

Affidavit of Defendant

Criminal No. 88-649

I, Bardall Tucker, under oath, hereby acknowledge that I have entered a plea of guilty to the charge(s) of:

Attempted Forgery
(Name of Crime)

[redacted]

Elements: Defendant attempted to make, complete, execute, authenticate issue or utter a check having a face amount less than $100.00 so that such purported to be the act of another, with the purpose to defraud.

Facts: Defendant presented a check for cashing knowing it was forged and he had no permiss

I have received a copy of the charge (Information) and understand the crime I am pleading guilty to is a Class A misdemeanor
(Degree of Felony or Class of Misdemeanor)

and understand the punishment for this crime may be 1 year prison term, $2500 + fine, plus a 25% surcharge, pursuant to title 63-63-9(2) U.C.A. as amended, or both. I am not on drugs or alcohol.

My plea of guilty is freely and voluntarily made. I am represented by Attorney Frances M. Palacios who has explained my rights to me and I understand them.

1. I know that I have a constitutional right to plead not guilty and to have a jury trial upon the charge to which I have entered a plea of guilty, or to a trial by a judge should I desire.

2. I know that if I wish to have a trial. I have a right to see and hear the witnesses against me in open court in my presence and before the Judge and jury with the right to have those witnesses cross examined by my attorney. I also know that I have a right to have my witnesses subpoenaed at state expense to testify in court upon my behalf and that I could testify on my own behalf, and that if I choose not to do so, the jury will be told that this may not be held against me.

3. I know that if I were to have a trial that the prosecutor must prove each and every element of the crime charged beyond a reasonable doubt, that any verdict rendered by a jury whether it be that of guilty or not guilty must be by a complete agreement of all jurors.

4. I know that under the constitution that I have a right not to give evidence against myself and that this means that I cannot be compelled to admit that I have committed any crime and cannot be compelled to testify unless I choose to do so.

5. I know that under the constitution of Utah that if I were tried and convicted by a jury or by the Judge that I would have a right to appeal my conviction and sentence to the Supreme Court of Utah for review of the trial proceedings and that if I could not afford to pay the costs for such appeal, that those costs would be paid by the State without cost to me.

6. I know and understand that by entering a plea of guilty I am giving up my constitutional rights as set out in the proceeding paragraphs and that I am admitting I am guilty of the crime to which my plea of guilty is entered.

7. I also know tht if I am on probation, parole, or awaiting sentencing upon another offense of which I have been convicted or to which I have plead guilty, my plea in the present action may result in

9. No promises or threats of any kind have been made to induce me to plead guilty. The following other charges pending against me, to-wit: (Court case number(s) or count(s)):

_____

_____

will be dismissed, and that no other charge(s) will be filed against me for other crimes I may have committed which are now known to the prosecuting attorney. I am also aware that any charge or sentencing concessions or recommendations or probation or suspended sentences, including a reduction of the charges for sentencing made or sought by either defense counsel or counsel for the State, is not binding on the Judge and may not be approved by the Judge.

10. I have read this Affidavit, or I have had it read to me by my attorney, and I know and understand its contents. I am 27 years of age, have attended school through the 14 years and I can read and understand the English language.

Dated this 11 day of July, 1988.

Randall D. Tucker
Defendant

Subscribed and sworn to before me in Court this 11th day of July, 1988.

ATTEST
H. DIXON HINDLEY
Clerk

By D L Sundberg
Deputy Clerk

Leonard W Russo
Judge

CERTIFICATE OF DEFENSE ATTORNEY:

I certify that I am the attorney for Randall Tucker, the defendant named above and I know he has read the Affidavit, or that I have read it to him, and I discussed it with him and believe he fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief the statements, representations and declarations made by the defendant in the foregoing Affidavit are in all respects accurate and true.

Defense Attorney

CERTIFICATE OF PROSECUTING ATTORNEY:

I certify that I am the attorney for the State of Utah in its case against Randall Tucker, defendant. I have reviewed the Affidavit of the defendant and find that the declarations are true and accurate. No improper inducements, threats, or coercions to encourage a plea have been offered the defendant. There is reasonable cause to believe the evidence would support the conviction of the defendant for the plea offered, and that acceptance of the plea would serve the public interest.

Richard G. Mackay
Prosecuting Attorney

ORDER

Based upon the facts set forth in the foregoing Affidavit and certification, the Court finds the defendant's plea of guilty is freely and voluntarily made and it is ordered that defendant's plea of "Guilty" to the charge, set forth in the Affidavit be accepted and entered.

Done in Court this 11th day of July, 1988.

ATTEST
H. DIXON HINDLEY
Clerk

D L Sundberg

Leonard W Russo
District Judge